IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 289 OF 1993

1. Mrs.Amarjit Thapar.

2. Shri Sanjay Thapar,

3. Shri Monish Thapar,
all Mumbai Indian Inhabitants of
Legal heirs and representatives of
late Shri Satyapal Thapar. ... Petitioners.

V/s.

1. S.K.Laul, Chief Engineer,

2. S.C.Tiwari, Commissioner of
Income Tax.,

3. C.M.Betgeri, Commissioner of
Income Tax,

Members of the Appropriate
Authority. Bombay.

4. A.K.Berera, Deputy Commissioner
of Income Tax, Appropriate
Authority (I.T.Dept.),

5. Union of India,

6. Mrs.Clare M. Fernandes. ... Respondents.

K.B.Bhujle i/b. S.V.Pikale & Co.
for the petitioner.

R.Ashokan for respondent Nos.1 to 5.

Vishal Kanade i/b. Mahimtura & Co.
for respondent No.6.

CORAM : **DR.S.RADHAKRISHNAN and V.C.DAGA, JJ.**

DATED : **4th June 2007.**

JUDGMENT : (Per Vijay Daga, J.)

. This petition is directed against the order dated 15th January,1993 (Exh.G) passed by the Appropriate Authority, Bombay under section 269-UD(1) of the Income Tax Act, 1961 ("Act" for short) for compulsorily purchase of House No.D-1 (BUA), 1991 sq.ft. with garage located in Mandar Co-operative Housing Society, Juhu Village, Mumbai ("said property" for short).

Facts :
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2. The relevant facts lie within a narrow compass. The petitioners are the intending purchasers of the said property; who agreed with respondent No.6 to purchase the said property vide agreement dated 30th October, 1992 for a consideration of Rs.64 lakh.

3. The petitioners on the very same day filed statement in Form 37-I of the Act with the Appropriate Authority. The said authority issued a show cause notice dated 17th December, 1992 expressing its intention to exercise option to

purchase the said property, however, without furnishing any material or reason in support of its intention to purchase.

4. The petitioners, on 23rd December, 1992, replied to the show cause notice and requested the Appropriate Authority to furnish material relied upon by them in support of their belief. The petitioners at the time of hearing on 24th December, 1992 reiterated their contention and, thereafter, again wrote a letter to the said authority dated 6th January, 1993 requesting for disclosure of the reasons and grounds on which the property was proposed to be acquired. On 28th January, 1993, the petitioners received the impugned order dated 15th January, 1993 without any reply to their repeated demands seeking reasons and grounds for proposed action.

5. Being aggrieved by the aforesaid order, the petitioners filed this writ petition on 8th February, 1993 under Article 226 of the Constitution of India. The writ petition was admitted, but no interim relief was granted. However, liberty in favour of the petitioners, to move for any other appropriate interim order, in the event of changed circumstances, was reserved.

6. The Appropriate Authority appears to have issued letter dated 4th March, 1993 offering to make payment of the amount prior to taking possession of the said property.

7. The petitioners, on 30th April, 1993, applied to this Court for interim stay on the ground that the petitioners were willing to make the payment as per agreement dated 30th October, 1992. However, this Court was pleased to pass the order dated 30th April, 1993 reading as under:

> "Put up before Appropriate Bench after vacation on 9th June 1993. No third party interest to be created until further orders."

8. The auction of the said property was fixed on 18th May, 1993. At the instance of the Revenue, this Court, vide order dated 11th June, 1993, was pleased to vacate the aforesaid order giving liberty to the petitioners to take out separate motion for relief in case of changed circumstances. The petitioners again moved Notice of Motion No.258/1993 to seek stay of the auction and offered to pay balance consideration against possession. This Court, vide order dated 9th July, 1993, was pleased to dismiss the notice of motion. However, respondents were directed not to auction the said property till the disposal of the petition. The

respondents had also taken out Notice of Motion No.185/1997 on 23rd May, 1997 for vacating interim order dated 9th July, 1993 with a prayer to allow them to auction the said property. However, no relief in that behalf was granted in favour of the respondents. However, in the meantime, it appears that the respondents- Union of India made payment of Rs.56,13,227/- to respondent No.6 on 26th February, 1993. With these facts on record petition was finally heard by us.

Preliminary Objection :
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9. At the outset Mr.Ashokan, learned counsel for respondent Nos.1 to 5 raised a preliminary objection to the maintainability of the petition contending that the petition at the instance of intending purchasers of the immovable property is not maintainable since the agreement to purchase does not create any interest in the immovable property. In support of his submission, he placed reliance on the Division Bench judgment of this Court in the case of **Smt.Vimla Devi G. Maheshwari v. D.D.Mohindra**, 268 ITR 102 (Bom.).

10. The preliminary objection raised, in our considered view, is misplaced. The said case of **Smt.Vimla Devi** (supra) was decided on its own

peculiar facts. The said judgment does not lay down any law as sought to be widely canvassed by Mr.Ashokan. This decision basically revolves around peculiar facts found in that particular case; wherein the petitioners were not in a position to deposit the purchase price as such no interim relief was granted in favour of the petitioners at the time of admission of the petition. The vendor had accepted the consideration without any demur or protest. The vendor made statement before the Court that he did not desire to challenge the acquisition. The transaction in question was completed much prior to the decision of the Supreme Court in the case of **C.B.Gautam v. Union of India**, 199 ITR 530 (SC). The Division Bench basically relied on the paragraph of the said judgment delivered in the case of **C.B.Gautam** (supra), which reads as under:

> " We may clarify that, as far as completed transactions are concerned, namely, where, after the order for compulsory purchase under section 269UD of the Income-tax Act was made and possession has been taken over, compensation was paid to the owner of the property and accepted without protest, we see no reason to upset those transactions and hence, nothing we have said in the judgment will invalidate such purchases. The same will be the position where public auctions have been held of the properties concerned and they are purchased by third parties. In those cases also, nothing which we have stated in this judgment will invalidate the purchases."

11. That after the compulsory purchase of the property, the property was put to public auction. The auction sale was confirmed in favour of respondent No.4 therein, though subject to the decision of the writ petition. The cumulative effect of all these facts led the Court to dismiss the petition holding it to be not tenable at the instance of the petitioners therein on the peculiar facts found by the Court. Thus, the said judgment cannot be a guide to hold that the intending purchasers of the property have no locus to challenge the order of acquisition. At this juncture, it will be relevant to note that in case of **C.B.Gautam** (supra), the petitioner before the Supreme Court was also an intending purchaser. The preliminary objection raised by Mr.Ashokan is, thus, without any substance and stands overruled.

Submissions on Merits :
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12. Mr.Bhujle, learned counsel for the petitioners urged that there was no understatement of consideration. That the impugned order is based on wrongly determined data as such the same is bad in law. That the comparable sale transactions relied upon by the petitioners were not considered and ignored by the Appropriate Authority. That the determination of rate. by the Appropriate Authority

in the sum of Rs.2,044/- per sq.ft. is improper and incorrect. That the show cause notice issued by the Appropriate Authority dated 17th December, 1992 is illegal and invalid.

13. Mr.Bhujle taking us through the show cause notice and order under challenge submitted that in the show cause notice no comparable instances were brought to the notice of the petitioners on the basis of which the said property was being acquired compulsorily.

14. Mr.Bhujle also urged that on proper calculation the percentage of difference has also been wrongly calculated by the Appropriate Authority as such impugned order on all counts suffers from illegality and liable to be quashed and set aside holding it to be erroneous and bad in law. He relied upon some judgment of this Court as well as that of Apex Court to bring home the aforesaid contentions urged by him, which we propose to refer at the appropriate stage of the judgment.

15. Mr.Ashokan, learned counsel for respondent Nos.1 to 5 tried to support the impugned order on merits.

Consideration :
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16. Having heard rival parties, the petitioners, in our considered view, deserve to succeed on all counts.

17. Firstly, there is no understatement of consideration, which would be clear from the following data:

The Appropriate Authority has determined the market value at Rs.3,400/- per sq.ft. of which 85% would constitute Rs.2,890/- per sq.ft. The total consideration agreed was Rs.64,00.000/- as such actual BUA is 1991.10 sq.ft. with a garage. The value of the garage as per the petitioners is Rs.1,00,000/-; whereas Rs.2,00,000/- as per the Appropriate Authority. The consideration of house as per the petitioners is Rs.63,00,000/-; whereas Rs.62,00,000/- as per the Appropriate Authority. The discounted consideration as per the petitioners is Rs.61,88,227/-; whereas Rs.60,88,227/- as per the Appropriate Authority. The calculations, if made, the rate of consideration as per

the petitioners would be Rs.3,164/-; whereas Rs.3,114/- as per the Appropriate Authority. Based on this, the discounted rate as per the petitioners is Rs.3,108/-; whereas Rs.3,058/- as per the Appropriate Authority.

Thus, the difference in the rates and the market value determined by the Appropriate Authority by any means is less than 15%, as such there is no undervaluation of consideration.

18. Apart from the above, the determination of rate by the Appropriate Authority in the sum of Rs.2,044/- per sq.ft. is improper and incorrect. The consideration of Rs.64,00,000/- was for transfer of house of BUA 1991.10 sq.ft. with a garage and nothing more. There was no question of transfer of FSI of 1,249.75 sq.ft. The basic assumption in this behalf is misplaced. The agreement dated 30th October, 1992 was for the transfer of house with garage only. It did not contemplate transfer of any FSI of 1,249.75 sq.ft., as considered by the Appropriate Authority while calculating the rate. The FSI was owned by the society and not by the member or transferor. The transferor had no authority to transfer any FSI at least on the date of

the agreement i.e. 30th October, 1992 in view of specific resolution adopted by the Society.

19. Even the circular issued by the society dated 21st November 1992 clearly stipulated that the FSI belonged to the society and not to the members. The resolution passed on 3rd January, 1993 by the special general meeting of the society for distribution of the additional FSI amongst the members could not and did not alter the position as on 30th October, 1992. The decision of the Appropriate Authority ought to have been based on the material and the facts as existing on the date of agreement i.e. 30th October, 1992 and not on the basis of any subsequent events. Even the letter of the Executive Engineer, Building Proposals, (W.S.), H & K/West wards dated 5th October, 1993 clarifies that there was no fresh proposal in that respect.

20. Let us consider it from another angle, that too through the glasses of the Appropriate Authority. On 28th July, 1993, the said property was put to auction along with an additional FSI of 1,249.75 sq.ft. for a reserve price of Rs.73,60,000/- which one has to presume to be a reasonable market value. Using the method adopted by the Appropriate Authority in its order dated 15th January, 1993, the rate per sq.ft. would be as

under:

		(Rs.)
	Reserve price:	73,60,000/-
Less	Value of garage:	2,00,000/-
		71,60,000/-
Add	Estimated cost of construction of 1,249 sq.ft. FSI	5,62,388/-
		77,22,388/-

Therefore the rate per sq.ft. of BUA would be-

$$\frac{77,22,388}{3,249.85} = \text{Rs.2,376/-}$$

If this rate is considered by the Appropriate Authority for auctioning the said property as reasonable, then there can be no justification for the Appropriate Authority to hold that there was understatement of the consideration in the case of the petitioners; where the rate fixed was more than Rs.3,000/- per sq.ft. Thus, there is absolutely no justification to conclude that there was understatement of consideration.

21. Apart from the above, the show cause notice dated 17th December, 1992 issued by the Appropriate Authority on the face of it, is illegal and invalid as it does not disclose as to how the tentative or prima facie conclusion was arrived at by

the Appropriate Authority that the said property was significantly undervalued. The show cause notice ought to be self-contained; containing all material facts and particulars.

22. In spite of repeated demands by the petitioners, the Appropriate Authority did not furnish the basis for issuing the show cause notice. In the case of **Mrs.Nirmal Laxminarayan Grover v. Appropriate Authority**, 223 ITR 572 (Bom.), this Court has held that show cause notice issued by the department for pre-emptive purchase by the Central Government under Chapter XX-C of the Act must disclose how the tentative or prima facie conclusion was arrived at by the Appropriate Authority that the property sought to be compulsorily purchased was significantly undervalued. It was further observed that an enquiry envisaged by section 269-U(1) of the Act is summary in nature in the sense that no elaborate procedure of enquiry, i.e. leading elaborate evidence etc. is contemplated by it, but it cannot mean that because enquiry is summary in nature its very basic requirement, viz., observance of the minimal principles of natural justice is dispensed with.

23. As held by this Court in the case of **Shreyas Builders v. M.D.Kodnani**, 242 ITR 320 (Bom.),

a defective notice is one which does not disclose basis on which it is issued. As held by this Court in **Jagdish Electronics (India) (P) Ltd. v. Appropriate Authority**, 242 ITR 326 (Bom) and upheld by the Apex Court in 264 ITR 468 (SC), where no reasons were disclosed for issuing the show cause notice nor any material that was considered by the Appropriate Authority to reach that tentative conclusion was disclosed in the notice, order of pre-emptive purchase based on such defective notice would be liable to be set aside.

24. In the case of **Appropriate Authority v. Vijay Kumar Sharma**, 249 ITR 554 (SC), the Apex Court was of the view that, where there was gross breach of principles of natural justice, in passing the order of purchase of the property, High Court was justified in quashing the proceedings instead of remitting it back for reconsideration. In **Sona Builders v. Union of India**, 251 ITR 197 (SC) the Apex Court held that denial of opportunity and non-furnishing of documents for holding consideration to be low would warrant setting aside of order of purchase.

25. The reasons on the basis of which a tentative finding has been arrived by the Appropriate Authority together with all relevant materials must be disclosed in the show cause notice by the

appropriate authority, in consonance with the principles of natural justice. Non-disclosure of material to be used against the concerned parties in the matter of compulsory purchase of property and denial of opportunity to the concerned parties result in vitiating the order under section 269-UD(1) of the Act [see *Ch.Kamala v. Appropriate Authority*, 240 ITR 63 (Mad)].

26. In the case of **Musthafa Ummer v. Appropriate Authority**, 254 ITR 134 (Ker), the property of the petitioners was sought to be purchased by the Government on the ground that its apparent consideration for transfer was less than the real consideration but the report of the engineering department as well as the documents relied upon by the Appropriate Authority were not furnished to the petitioners, as such order of purchase of the property was set aside for want of proper opportunity to the petitioners.

27. The impugned order passed by the Appropriate Authority dated 15th January, 1993 is solely based on the calculation of additional FSI of 1,249.75 sq.ft. as per the resolution of the society dated 3rd January, 1993. As already held hereinabove, this could not have been the basis for the show cause notice dated 17th December, 1992. In

the circumstances, there was no question of understatement of consideration at least at the stage of show cause notice as discussed herein. It is, therefore, clear that the said notice was issued arbitrarily without any evidence as to the understatement of consideration as such illegal and invalid.

28. The impugned order of the Appropriate Authority passed under section 269-UD(1) of the Act is also illegal and invalid. It is clear that there is no understatement of consideration as observed hereinabove. The order of the Appropriate Authority is bad in law as it was passed on the basis of rate wrongly determined by it. Even the comparable transaction relied upon by the petitioners were not considered by the Appropriate Authority. The Supreme Court has clearly observed in **Union of India v. Chiranji Estate (P) Ltd.**, 251 ITR 7 (SC) that just as comparison of incomparable properties is fallacious, non-comparision of comparable properties is equally fallacious. This Court in the case of **Vimal Agarwal v. Appropriate Authority**, 210 ITR 16 (Bom) held that an order passed merely on the basis of sale instances given by the Appropriate Authority without considering sale instances referred to by the aggrieved parties and setting out cogent reasons for not acting upon them is not a proper and valid order.

29. Where the comparable sale instances cited by the parties have not been dealt with by the Appropriate Authority, its order of purchase could not be sustained and is liable to be quashed [see *Hunaida Jamnagarwala v. Appropriate Authority*, 217 ITR 679 (Guj); *Chokhawala Associates v. Appropriate Authority*, 238 ITR 653 (Guj)].

30. Where the Appropriate Authority has failed to clearly determine the fair market value and to specify that undervaluation was intended to evade tax and refused to consider the comparable sale instances submitted by the affected party, its action stands vitiated on the face of it [see *Himmatlal Vadalia v. Union of India*, 232 ITR 854 (MP)].

31. The order of the Appropriate Authority is invalid and void *ab initio* as there is no positive finding that there was an attempt to evade tax. The Apex Court in the case of **C.B.Gautam v. Union of India**, 199 ITR 530 (SC) held that the very historical setting in which the provisions of this Chapter were enacted indicates that it was intended to be resorted to only in cases where there is an attempt to evade tax by significant undervaluation of immovable property agreed to be sold. In the case of **Nirmal Laxminarayan Grover** (supra), this Court held that

recourse to compulsory purchase of the immovable property; under Chapter XX-C of the Act should be taken only in clear cases of gross undervaluation from which the interference must clearly flow that it is done for evasion of taxes.

32. In view of the judgment of the Supreme Court in **C.B.Gautam** (supra), unless the difference in the apparent effective consideration and the market value is more than 15%, the Appropriate Authority cannot assume jurisdiction under section 269-UD of the Act. The same does not mean that the mere fact that such difference is more than 15% will, automatically, lead to the conclusion that there has been undervaluation of property with the motive of evading tax. In **Vimal Agarwal** case (supra), this Court has reiterated that right of pre-emptive purchase under section 269UD is not a right of pre-emption simpliciter but is a right which can be exercised only in the cases where there is significant under valuation in agreement of sale with a view to evade tax. The onus of establishing that undervaluation is with a view to evade tax is on the Revenue. No such finding is to be found in the impugned order.

33. In the circumstances, the impugned order passed by the Appropriate Authority is liable to be

quashed and set aside holding it to be in breach of principles of natural justice and bad in law. The view taken by the Appropriate Authority is palpably erroneous and cannot stand to the scrutiny of law even on merits.

34. The petitioners shall pay to the Income-tax Department Rs.56,13,227/- within four weeks from the date of pronouncement of the judgment, failing which, the same shall carry interest @ 12% per annum.

35. In the result, petition is allowed. Rule is made absolute in terms of this order with no order as to costs.

(V.C.DAGA J.) **(DR.S.RADHAKRISHNAN, J.)**